A

AMALAN TEPAT SDN BHD

v.

PANFLEX SDN BHD

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZULKEFLI MAKINUDIN FCJ
RAUS SHARIFF FCJ
[CIVIL APPEAL NO: 02( )-20-2010(J)]
C 21 JUNE 2011

CIVIL PROCEDURE: *Judgments and orders - Declaratory relief - Granting of - Application for declaratory judgment pursuant to O. 19 r. 7(1) Rules of the High Court 1980 - Whether must be supported by*
D *evidence of factual matrix - Whether impugned judgment a judgment in default of defence - Whether impugned judgment being declaratory in substance did not meet the entrenched rule of practice - Gan Boon Kyee v. Yap Hong Sin & Anor - Patten v. Burke Publishing Co*

E The respondent commenced an action at the High Court against Gymtech Development Sdn Bhd ('first defendant') and the appellant as the second defendant (referred to as the appellant herein). In the action against the appellant, the respondent prayed for, *inter alia*, a declaration that the supplementary agreement
F entered between the respondent, the first defendant and the appellant had been validly cancelled and terminated by the respondent. The appellant filed an application (encl. 14) to extend time to file a defence which was dismissed. Upon the dismissal of encl. 14, the application of the respondent (encl. 10) was allowed
G with judgment in default of defence entered in favour of the respondent. The appellant then proceeded to file an application (encl. 51) to set aside the judgment in default of defence which was dismissed. Leave to appeal was given by this court on one question, namely, whether an application for a declaratory
H judgment in default of defence pursuant to O. 19 r. 7(1) of the Rules of the High Court 1980 must be supported by evidence of the factual matrix to enable a judge to exercise his discretion in granting or refusing the declaratory relief prayed for.

I

Held (allowing the appeal)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) As declaration was the main prayer of the respondent, it is a rule of practice that before such relief is granted there must be evidential basis to do so. Courts are very slow in granting declaratory prayer without any evidence and argument advanced. It is a rule of practice that 'the court does not make declarations of right either on admissions or in default of pleading' (*Gan Boon Kyee v. Yap Hong Sin & Anor; Patten v. Burke Publishing Co*). The main relief in the impugned judgment was the declaration that the supplementary agreement entered between the respondent, the first defendant and the appellant had been validly terminated by the respondent. It was also on record that the impugned judgment was granted upon the dismissal of the encl. 14 application for extension of time to file the defence by the appellant. In other words, the impugned judgment was in fact a judgment in default of defence. There was nothing to indicate that discretion was exercised by the court when granting the declaratory relief as found in the impugned judgment. The impugned judgment being declaratory in substance had not met the entrenched rule of practice applicable as exposited above for the granting of declaratory relief. (paras 13, 16, 17 & 19)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Responden memulakan tindakan ini di Mahkamah Tinggi terhadap Gymtech Development Sdn Bhd ('defendan pertama') dan perayu sebagai defendan kedua (dirujuk sebagai perayu di sini). Di dalam tindakan terhadap perayu, responden memohon untuk, *inter alia*, deklarasi bahawa perjanjian tambahan yang dimasuki responden, defendan pertama dan perayu telah dengan sah dibatalkan dan ditamatkan oleh responden. Perayu memfailkan permohonan (lampiran 14) melanjutkan masa untuk pemfailan pembelaan yang telah ditolak. Setelah permohonan lampiran 14 ditolak, permohonan responden (lampiran 10) dibenarkan dengan penghakiman ingkar pliding dimasukkan berpihak kepada responden. Perayu kemudiannya memfailkan permohonan (lampiran 51) untuk mengenepikan penghakiman ingkar pliding yang juga ditolak. Kebenaran merayu dibenarkan oleh mahkamah ini atas satu soalan iaitu sama ada permohonan untuk satu penghakiman

deklarasi ingkar pliding di bawah A. 19 k. 7(1) Kaedah-kaedah Mahkamah Tinggi 1980 harus disokong oleh keterangan matriks nyata untuk membolehkan seorang hakim melaksanakan budibicara beliau dalam membenarkan atau menolak relif deklaratori yang dipohon.

Diputuskan (membenarkan rayuan)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Oleh kerana deklarasi adalah permohonan utama responden, ia adalah peraturan amalan bahawa sebelum relif tersebut dibenarkan ia seharusnya berdasarkan keterangan jelas. Mahkamah agak berhati-hati dalam membenarkan permohonan deklarasi tanpa apa-apa keterangan atau hujahan dikemukakan. Ia adalah peraturan amalan bahawa 'mahkamah tidak akan membuat apa-apa deklarasi yang boleh dikuatkuasakan sama ada atas pengakuan atau dalam ingkar pliding' (*Gan Boon Kyee v. Yap Hong Sin & Anor; Patten v. Burke Publishing Co*). Relif utama dalam penghakiman yang disoalkan adalah deklarasi bahawa perjanjian tambahan di antara responden dengan defendan pertama serta perayu telah dengan sah dibatalkan oleh responden. Ia juga atas rekod bahawa penghakiman yang disoalkan dibenarkan setelah permohonan lampiran 14 untuk lanjutan masa pemfailan pembelaan oleh perayu dibatalkan. Dengan kata lain, penghakiman yang disoalkan adalah penghakiman ingkar pliding. Tiada apa-apa yang menunjukkan budibicara dilaksanakan oleh mahkamah apabila membenarkan relif deklaratori seperti di dalam penghakiman yang disoalkan. Substans penghakiman yang disoalkan adalah deklaratori dan tidak mematuhi peraturan amalan yang digunakan seperti dipaparkan di atas untuk membenarkan relif deklaratori.

[Perintah seharusnya.]

Case(s) referred to:
Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 CA ***(foll)***
Patten v. Burke Publishing Co [1991] 2 All ER 821 ***(refd)***

For the appellant - Dato' Harpal Singh (Ibrahim Hashim, Hassan Ibrahim, Haryinder Singh & Ivan Loo with him); M/s Hassan Ibrahim & Co
For the respondent - KK Wong (Shanmugaraj Chelliah, Low Eu Thuan & Karen Lee with him); M/s Ngae Shan Kalai & Co

[Appeal from Court of Appeal; Civil Appeal No: J-02(IM)-1393-2010]

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] Leave to appeal was given by this court on 4 November 2010 on one question, namely:

> Whether an application for a declaratory judgment in default of defence pursuant to Order 19 r. 7(1) of the Rules of the High Court 1980 must be supported by evidence of the factual matrix to enable a judge to exercise his discretion in granting or refusing the declaratory relief prayed for?'

[2] We heard the appeal on 19 April 2011. After hearing the submissions of learned counsel for the parties we answered the question in the positive and allowed the appeal. Accordingly we set aside the default judgment obtained in the High Court on 29 April 2010 ('the impugned judgment') and which was upheld by the Court of Appeal on 6 October 2010. We also ordered that the case should go for full trial. No order as to costs was made and that the deposit paid for the appeal was ordered to be refunded to the appellant.

[3] We now give our reasons for our decision.

[4] Briefly the respondent commenced an action at the Muar High Court, Johor, against Gymtech Development Sdn Bhd as the 1st defendant and the appellant as the 2nd defendant (referred to as the appellant in this judgment).

[5] In the action as against the appellant, the respondent prayed for the following, *inter alia*:

(a) a declaration that the supplementary agreement entered between the respondent, the 1st defendant and the appellant has been validly cancelled and terminated by the respondent;

(b) the refund of the purchase price amounting to RM2,913,160 for the 14 units of condominium;

(c) as an alternative, special loss and specific damages to be accounted and assessed based on the contra costs/set off in the sum of RM2,913,160; and

(d) interest at the rate of 8% per annum from the date of the supplementary agreement that is 11 August 2000 or such date as deemed by the court.

[6] The solicitors for the appellant failed to file the defence within the time prescribed and only filed it on 10 October 2006.

[7] Subsequently the respondent filed an application (encl. 10) while the appellant filed an application (encl. 14) to extend time to file the defence. Both applications came up for hearing on 24 August 2007. Enclosure 14 was heard first and dismissed. Upon the dismissal of encl. 14 the application of the respondent that is encl. 10 was allowed with judgment in default of defence entered in favour of the respondent.

[8] Several notices of motion were filed with the Court of Appeal in relation to the encl. 10 and encl. 14. However, none of them were allowed by the Court of Appeal. There were also stay applications made by the appellant but none of them succeeded.

[9] The appellant then proceeded to file an application (encl. 51) to set aside the judgment in default of defence. It was dismissed by the Muar High Court on 29 April 2010. The reasons were that the doctrine of *res judicata* applied and delay for more than 2 years without any reasonable explanation given for such delay. The merit of the defence was not considered.

[10] In dismissing the appeal against the refusal of encl. 51 the Court of Appeal also held that there was no reasonable explanation given for the delay in making the application.

[11] Before us one of the critical point raised by learned counsel for the appellant was that the main prayer sought for by the respondent was for a declaratory relief. As such default judgment should not be allowed unless supported by evidence and for the court to consider before it exercises its discretion.

[12] For the respondent it was contended *inter alia* that the application to set aside the default judgment was made long after the 30 days period provided for under the RHC. Further it was submitted that there was no defence to the claim and the doctrine of *res judicata* applied. Learned counsel went on to say that in any event the default judgment could be severed to exclude the declaratory aspect of it.

[13] With respect we are unable to agree with the submission of learned counsel for the respondent. As declaration was the main prayer of the respondent it is a rule of practice that before such

relief is granted there must be evidential basis to do so. Courts are very slow in granting declaratory prayer without any evidence and argument advanced.

[14] In *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822 the Court of Appeal said this at p. 825:

> I have read the judgment of the learned judicial commissioner with great care, bearing in mind that this is not the case of an ordinary judgment in default but one of declaratory relief. As observed by *Zamir & Woolf on The Declaratory Judgment* (2nd Ed) at p 264:
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> > ... courts will generally be reluctant to grant a declaration as part of a default judgment in the absence of any evidence and argument. Before the court grants a declaration, it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief.' per Gopal Sri Ram JCA (as he then was).

[15] We are inclined to agree with the dicta in the above mentioned case.

[16] In fact it is a rule of practice that 'the court does not make declarations of right either on admissions or in default of pleading' and the rule is quite entrenched as observed in the case of *Patten v. Burke Publishing Co* [1991] 2 All ER 821. This is what Millet J said:

> It is not the normal practice of this division to make a declaration when giving judgment by consent or without a trial as in the case of a judgment in default of defence or of notice of intention to defend the proceedings. That is a practice of very long standing. It was confirmed in *Wallersteiner v. Moir* [1974] 3 All ER 217, [1974] 1 WLR 991. In that case the claim, which was contained in a counterclaim, sought a declaration that the plaintiff had been guilty of fraud, misfeasance and breach of trust. The judge granted the declaration in default of the defence and the Court of Appeal struck it out. Buckley LJ said ([1974] 3 All ER 217 at 251, [1974] 1 WLR 991 at 1029):
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> > It has always been my experience, and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v. Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the

> Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a *fortiori* they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation.

Scarman LJ gave judgment to the same effect but in somewhat different terms. He said ([1974] 3 All ER 217 at 253, [1974] 1 WLR 991 at 1030):

> When what is sought is a declaration, there is the risk of irremediable injustice; the court has spoken and words cannot be recalled, even though later they may be negatived: *"nescit vox missa reverti"* (Horace Ars Poetica I 390). The power of the court to give declaratory relief on a default of pleading, of course, exists, but, for the reason crystallised by Horace in those four words of his, should be exercised only in cases in which to deny it would be to impose injustice on the claimant. This approach leads me to the conclusion that the declaratory relief contained in the minute of judgment annexed to the order of Geoffrey Lane J should be disallowed at this stage.

There was of course a strong objection to the inclusion of the declaration sought in that case. Even after trial it is not the normal practice of the court to make a declaration that the defendant had been guilty of fraud or negligence. Justice can be done to the plaintiff by awarding him damages. If he wishes to parade the basis upon which damages have been awarded to him, he has a judgment which he can produce. The judgment will contain the findings of fraud or negligence upon the basis of which the damages have been awarded, and that should be sufficient for the plaintiff's purpose. But in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts been

investigated. *Quite apart from this, however, it is clear from Wallersteiner v. Moir that the rule is a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without such a declaration*. (emphasis added).

[17] Reverting to the present case there is no dispute that the main relief in the impugned judgment is the declaration that the supplementary agreement entered between the respondent, the 1st defendant and the appellant has been validly cancelled and terminated by the respondent. It is also on record that the impugned judgment was granted upon the dismissal of the application (encl. 14) for extension of time to file the defence by the appellant. (See: judgment of the Muar High Court dated 29 April 2010). In other words the impugned judgment is in fact a judgment in default of defence.

[18] Meanwhile, there is nothing to indicate that discretion was exercised by the court when granting the declaratory relief as found in the impugned judgment.

[19] We therefore find that the impugned judgment being declaratory in substance has not met the entrenched rule of practice applicable as exposited above for the granting of declaratory relief. Accordingly on this ground alone that we should allow this appeal.

[20] However, there is another issue which is not directly within the ambit of the question posed. Nevertheless we should briefly address it. It is the sum which the appellant is required to pay under the impugned judgment. We are of the view that it is in fact a consequential order. As such if the declaratory relief in the impugned judgment is set aside then it has no basis to stand on.

[21] Further, although the prayer refers to the refund of purchase price for 14 units of condominium, in fact it has to do with the construction works rendered by the respondent for the 1st defendant. In this case there was no proper assessment of the actual sum the respondent should be paid. Thus the sum ordered to be paid has not been justified. We therefore decline to accede to the suggestion that the impugned judgment can be severed so as to exclude the declaratory relief.

A **[22]** We are conscious of the alleged indolence on the part of the appellant in the conduct of this case. However, it is not a sufficient reason to ignore 'a practice of very long standing' on the grant of declaratory relief for judgment in default. Thus, despite the appellant succeeding in this appeal we made no order as to
B costs against the respondent.

[23] Accordingly for the foregoing reasons we allowed the appeal and made the other orders as we did. We find no reason to deal with the other points raised by learned counsel for the parties.
C Further, we do not think there is any injustice caused to the respondent since we have ordered for the case to go for full trial.

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